

Meaden Screw Products, Co. and Brian Freid. Case
13-CA-34483

May 15, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On August 1, 1997, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the complaint be dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In light of our adoption of the dismissal of the complaint, we find it unnecessary to pass on the judge's finding that Brian Freid was not a supervisor under Sec. 2(11) the Act.

² In adopting the judge's conclusion that Freid was discharged because the Respondent's president suspected him of deliberately impairing production, we note that the testimony of the Respondent's president, Meaden, corroborated the testimony of the Respondent's attorney, relied on by the judge, concerning Meaden's reason for discharging Freid.

Valerie O. Barnett and Cynthia Rincon, Esqs., for the General Counsel.

Keith L. Pryatel, Esq. (Millisor & Nobil), of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Chicago, Illinois, on May 12 and 13, 1997. The charge was filed July 29, 1996,¹ and the complaint issued on January 31, 1997. The complaint alleges that Meaden Screw Products, Co. (Respondent) discharged Brian Freid on February 2 in violation of Section 8(a)(3) and (1) of the Act. Respondent filed a timely answer which admitted the allega-

¹ All dates are in 1996 unless otherwise indicated.

tions in the complaint concerning the filing and service of the charge, jurisdiction, the labor organization status of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), and agency status; Respondent denied the substantive allegation of the complaint. It also alleges a number of affirmative defenses, including that Freid engaged in acts of sabotage of Respondent's goods and property and that Freid was a supervisor within the meaning of Section 2(11) of the Act.

Because I find that the General Counsel has failed to establish a prima facie case and that Freid was discharged because Respondent suspected that he was deliberately impairing production, I conclude that the complaint should be dismissed.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been engaged in the manufacture of screw machine products at its facility in Burr Ridge, Illinois, where it annually purchases and receives products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Illinois. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent employs approximately 110 persons at its facility, where it manufactures machine screw products and other similar items. Respondent's manufacturing operations are divided into four primary departments. The multiple spindle department produces screw machine products of 1-inch diameter or larger. The davenport department produces smaller screw machine products. The single spindle department produces products that require longer cycle time to produce. Finally, the CNC department consisted of computerized, highly technical screw machines. Each of these departments had a leadperson with certain responsibilities for the department. Freid was the leadperson with responsibilities for the CNC department, where six other employees worked.

Freid reported to Jeff Obert, assistant plant manager, who oversaw the CNC department as well as certain other departments. Completing the managerial hierarchy, Bobby Gonzales was the plant manager and Tom Meaden was Respondent's president and chief operating officer.

Freid, who began his employment with Respondent in 1989, became leadperson in the CNC department in September 1994. On June 19, 1995, Freid received a written evaluation in which he was rated on a scale of one to five in nine categories. He was rated at five, the highest rating, in eight of the nine categories and received a four in the remaining category. Freid's supervisor, Obert, wrote "[Freid's] role as leadman has allowed the company to make improvements in the CNC area. [Freid] continually looks for ways to run the

jobs at maximum efficiency.” At that time Freid’s salary increased from \$17.02 to \$18.02 per hour.

B. Union Activity

During the summer months in 1995 Freid and other employees and leadpersons discussed the possibility of organizing a union campaign to obtain representation for Respondent’s employees. In August 1995, Freid contacted the Union and spoke to Union Organizer Tim Pihl. Freid told Pihl that the Respondent’s employees were interested in becoming represented by a union. He pointed out that the interest had mainly come from the leadpersons. Pihl said that the Union represented leadpersons at other facilities and that he did not see that as a problem. Approximately 2 weeks later a meeting was held at a nearby hotel at which about 30 employees were present, including Freid. During the meeting the employees were told about the process for obtaining union representation, including that they would have to collect signatures from about 70 to 75 percent of the employees indicating their support for the Union. Thereafter, Freid and other employees obtained the necessary signatures.² By the beginning of October 1995, the signatures had been obtained and another meeting was held at which the signed documents were given to union representatives.

On November 1, 1995, the Union filed a representation petition with the Board seeking to represent a unit of Respondent’s production and maintenance employees. Respondent and the Union agreed to a stipulated election, and the election date was set for December 16, 1995. However, the government shutdown that occurred that month forced the cancellation of the election. It was rescheduled for January 18. The leadpersons’ ballots, including Freid’s, were challenged at the election by Respondent on the basis that they were supervisors. The employees voted to select the Union as their collective-bargaining representative and the challenged ballots were not determinative. On January 24, Respondent filed objections to the election in which it asserted that three “supervisors,” including Freid, had actively campaigned on behalf of the Union by soliciting employee support for the Union, making material misrepresentations on behalf of the Union, and actually or impliedly threatening or coercing employees to support the Union. Thereafter, however, Respondent withdrew the objections and recognized the Union. Collective bargaining ensued and a contract was agreed to and signed effective March 15, 1997.

Freid campaigned for the Union by setting up meetings, handing out union literature, and distributing union buttons. In December 1995, before the first scheduled election was canceled, Gonzales approached Freid while he was working in the CNC department. Gonzales thanked Freid for handling himself in what Gonzales described as a professional manner during the organizing campaign. Gonzales said that Freid’s department continued to work and that he hoped that the other leadpersons and their departments were working as efficiently as Freid’s department. On another occasion while Freid was in the CNC department he was approached by Obert who asked him if he really felt that a union was necessary. Freid responded that he thought something was

wrong, that the employees had worked a lot of overtime and their profit sharing was minimal.³ Freid also stated that he thought it was unfair the way Meaden and Gonzales were treating leadperson Steve Ewing, because they felt Ewing had started the union organizing effort. Obert said that he was surprised that Freid had started the union campaign, but that he would not tell Meaden that information unless he was asked. This conversation took place sometime after the petition was filed but before Freid’s December 1995 oral evaluation, described below. Another conversation took place in January before the election. Present were Freid, Obert, and employees Boswell and McKee. Obert asked Freid how he thought the election would go. Freid said that he felt the Union still had good support even though the first election had been canceled. Freid predicted that the Union would win the election.⁴

In December 1995, Freid received an oral evaluation from Obert and Gonzales. Freid was told that he would not receive a written evaluation at that time because his wage rate was above the maximum set by Respondent. Freid stated that he felt he was underpaid for the skills he had; he was told he had to raise that matter with Meaden. Obert and Gonzales told Freid that he was doing a very good job but that they wished Freid would improve his punctuality in showing up for work because Freid was setting a bad example for other employees. Freid replied that he would work on that problem, but if they added up all the time he was late, it would not add up to 8 hours.⁵

C. Supervisory Status⁶

Six employees, excluding Freid, worked in the CNC department. Four employees and Freid worked on the first shift and the other two employees worked on the second shift. At about the time of Freid’s discharge in February there were 11 machines in the department.

When new jobs were sent to the CNC department, Freid was responsible for programming the machines so that the new products were produced. On average, this occurred two or three times a week. Once the machines were set up and operating the operator did not have to continuously monitor them since they were self-operating at that point. During the time Freid was leadperson he was sent for training on programming the machinery on two occasions for a week each. All the other operators in the department also received similar training at some point. Freid was also responsible for

³In his brief the General Counsel quotes Freid as responding to Obert’s inquiry with a “yes,” citing p. 59 of the transcript. I have searched the record in an effort to determine whether Freid’s response was as clear as the General Counsel represents; I conclude the General Counsel’s recitation of the facts is in error in this regard.

⁴The General Counsel does not allege that Respondent violated the Act by any comments made during these meetings. These findings are based on the uncontested testimony of Freid. Respondent did not call Gonzales to testify or explain its failure to do so. Although Obert did testify he did not deny these conversations as described by Freid.

⁵I have considered Obert’s testimony concerning this review meeting. It is sufficiently hesitant in certain respects that I conclude that Freid’s version is the more accurate one.

⁶My findings in this section are based on a composite of the testimony of Freid and Obert. Their testimony does not conflict in any essential way. I have also considered and included relevant documentary evidence.

²The record does not clearly disclose whether the signatures were on authorization cards, a showing of interest petition or some other matter.

checking a newly produced part to assure that it was manufactured in accordance with the specifications before that part was turned over to the quality control department for first piece approval.

Freid reported to work 15 minutes before the other employees. He used this time to start the machines that would be used that day. He also reviewed daily production reports filled out by the operators on the previous day. This form has columns in which the employee is to record items such as job-related downtime, nonjob-related downtime, and downtime resulting from the unavailability of a machine. Freid initialed these forms in a column labeled "foreman's O.K." This indicated that the forms were properly filled out in terms of correct job number, etc., and were an accurate reflection of hours recorded. When necessary Freid would correct any mathematical errors made by employees in filling out the forms. Freid then spent the remainder of the day working in the department operating a machine or setting up another machine. During the day when an operator had problems with a machine, the operator would see Freid, who would attempt to resolve the problem. If there was a programming problem Freid was likely able to resolve it, since he was responsible for programming the equipment so that it would produce the parts in accordance with the specifications. If Freid was not able to solve the programming problem he consulted with engineering group on how to resolve it. When there was a maintenance problem either Freid or the operator would fill out a maintenance work order form. Freid signed these forms to indicate that the maintenance problem was genuine. Freid normally worked a 9-hour day; he spent approximately 8 hours a day operating a machine.

One of Freid's responsibilities was the assignment of employees to operate 1 or more of the 11 machines in the department. Operators generally ran two machines at time. At the end of his shift Freid would prepare a schedule and assign employees to certain machines to run specific jobs. Unforeseen circumstances, such as equipment failure, would cause Freid to revise his assignments. Freid made these assignments based on his knowledge of the skill of the employee in operating a particular machine. For example, one of the employees on the second shift usually operated the milling machine and the other employee operated the lathe until the mill operator had been trained so he could also run the lathe. Some employees were able to operate all the machines in the department; other employees were able to operate only four or five machines. The abilities of the operators was a matter of common knowledge and was not a matter known only by Freid. Freid used a production schedule prepared by the production control manager in assigning work. This was issued weekly and listed the jobs and their completion dates, and Freid was told to follow the order set in terms of completion dates. Thus, when an operator became available and needed work, Freid would look at the production schedule and ascertain what job Respondent wanted completed next and then assign the operator to that job if the operator was able to run the machine needed to do the job.⁷

⁷Freid described the assignment of work from the production schedule as follows: "It's kind of brain dead thing, this you look at it [sic], this one comes first, this one comes next." Obert testified, "I don't think I would make it that simplistic." Regardless of how the assignment process is characterized, Freid's and Obert's testi-

At times Freid would deviate from the order set on the production schedule when, for example, different jobs were very similar to each other and setup time could be saved if the jobs were run back to back. However, in those circumstances Freid always first obtained permission from his superiors. Freid also would assign employees to work on machines for training purposes. At times Obert would instruct Freid that an operator should be trained; Obert did this most frequently for employee Austin. Freid would work with the employee and provide the necessary training. Employees from the second shift would come in early to receive training from Freid.

On one occasion Freid reported to Obert that an operator was damaging tooling and that Freid had tried to talk to the operator but he was "not getting through." Freid asked Obert to speak to the operator and Obert did so. Obert told the operator that Freid had a concern that the operator was not addressing. The operator claimed that he was doing nothing wrong, but that he would try and work things out and change. Obert testified that "we kind of left it at that."

On another occasion, on January 17, Obert recorded the following incident involving Freid.

I was having a conversation with Deron Boswell, C.N.C. Setter/Operator, while he was by the machines that Brian Freid assigned him to operate. During our conversation Brian Freid, C.N.C. Supervisor/Leadperson, walked up to us and asked Deron Boswell if everything over here was okay. Deron Boswell replied, "My machines are running," Brian Freid said, "Well, if there was any problems in the department, he should be made aware of that because after all he is suppose to be supervisor of this C.N.C. Department." Brian Freid then asked Deron Boswell, "When was the last time you quality checked your production?" Deron Boswell replied, "the machines are running very good." Brian Freid then went and picked up a quality check off sheet that is placed by each machine and he asked Deron Boswell, "Are you using the check off sheet and marking it every hour like the department's procedures specify?" Deron Boswell said, "No, I haven't been." Brian Freid said, "Let's start doing what we are suppose to be and not stand around talking." Brian Freid then walked away and I told Deron Boswell, "Brian is right. You should be filling out the quality check off sheets." I then walked over to Brian Freid and said to him, "I agree with what you had to say to Deron Boswell about filling out the quality check off sheets, but I disagree with two of the things that you did."

1. You never should have reprimanded Deron in front of me or any other employee. All discipline should be done in private.

2. You should try to refrain from raising your voice when talking with an employee about a performance problem.

Brian said, "Yes, he agreed but that it's not easy to do." Brian then asked, "How would you feel if you were telling people everyday to follow department pro-

mony are essentially the same concerning how in fact assignments were made.

cedures and they didn't listen." I said to Brian, "You just have to keep reminding them of following the proper procedure and if they do not, document that they do not listen." I then said to Brian Freid, "I hope you were not just checking on Deron Boswell because he was talking with me." I asked if he had checked the other C.N.C. employees today to see if they were following departmental procedure. He said that he had been very busy today but that he will if he can find the time.

When Freid became a leadperson there were only seven machines in the department and only three employees on the first shift, including Freid. Sometime in 1995 two machines that had been in the single spindle department were transferred to the CNC department along with two employees. That same year three new machines were purchased by Respondent and placed in the CNC department. The training needed to learn to operate these new machines resulted in some loss of direct production time.

In Freid's last written evaluation in June, he was evaluated in the following areas: care of company property, house-keeping, quality of work, quantity of work, flexibility, job knowledge, dependability, attitude, and safety. Freid punched a timeclock, as did the other operators in his department. Freid took his lunch together with other employees from the CNC department in Respondent's lunchroom. Obert, Freid's superior, ate in another area.

Obert spent an average of about 1 hour a day in the CNC department. Obert did not know how to program the machines in the CNC department so he relied on Freid to do so and to train other employees to do so. Since Obert lacked that technical knowledge the employees looked to Freid for guidance and assistance on technical matters.

Respondent holds meetings for its managers and supervisors. Freid did not attend those meetings until the November 1995 meeting, which was after the Union filed its representation petition. Prior to that meeting Freid was told by Obert that Meaden thought it would be a good idea if leadpersons started to attend those meetings. During the first November management meeting the participants discussed topics such as incoming work, late jobs, and areas that needed improvement. Freid, however, did not make any remarks at the meeting. Another meeting was held about week or so after the first meeting. Present at this meeting was David Schreiner, Respondent's attorney; Schreiner had not attended the earlier meeting. During this meeting Schreiner said that Respondent considered the leadpersons to be supervisors. He said that supervisors were not protected under the Act and could not campaign for the Union.⁸

Obert was responsible for conducting a formal performance review of the operators in the CNC department every 6 months. These reviews were used in determining wage increases and promotions. Freid did not attend the performance

review meetings between the operator and Obert.⁹ Prior to the performance review Obert would talk to Freid and ask him how he felt an operator was doing on his or her job, and Freid would provide an opinion; Freid possessed greater technical knowledge of the work done in the CNC department than did Obert. There is no evidence that Freid made any specific recommendations. Obert used the information he gained from Freid as well as information he gained from various records maintained by Respondent, in formulating the formal performance reviews. It was not until December 1995, or January that Freid was asked to play a direct role in the operators' formal performance review. At that time, Obert summoned Freid into the office Obert shared with Gonzales and asked Freid for his input concerning the work performance of two operators that was to be used in their performance review. Obert asked if Freid felt that the employees deserved a raise or a promotion. While Freid described the type of work the operators did, he was reluctant to suggest a specific amount for a raise, but he indicated that he felt every employee deserved a raise, that all the employees were underpaid for the work they were doing; that their hours had been cut from 11 hours per day to 8-1/2 hours per day.

When Freid became leadperson in September 1994, he was shown a job description for a generic leadperson position; he was told that there was no specific job description for the CNC leadperson position. However, thereafter a job description was established for that position. The job description for Freid's position, entitled "CNC Leadman Job Description" follows in its entirety.

Responsible for departmental management. Is an important member of the team with the responsibility to keep the work flowing accurately on Meaden Screw Products' 24 hour work schedule.

Will work closely with both the primary Department Head and Shift Supervisors. Will remain an hourly employee with the expectation of utilizing overtime himself to keep the Department operational. Will start work 15 minutes before the rest of the Department to guarantee that the assigned schedules can be maintained. This will also allow him to communicate with other Leadmen and Supervisors in planning for their shifts' responsibilities. Additional duties follow below:

1. Make all first piece, job approval inspections before asking Quality Control for an okay.
 - 1a. Responsibility for department's work: dimensions, finishes.
 - 1b. Spot check production accuracy (quality within department).
2. Okay all machine down time, either job related or non-job related and inform the shift supervisor of any problems.
 - 2a. Certify reported cycle times to Production Control.
 - 2b. Certify production tickets accuracy.
3. Troubleshoot when necessary. Help to get the job running if unable to assign alternate machine to operator.

⁸This is based on the credible testimony of Obert and Schreiner as well as notes Schreiner made of the meetings. I do not credit Freid's testimony that Schreiner explicitly told the leadpersons that they could not campaign for the Union or else they *would* be fired or his later testimony that Schreiner said that they *could* be fired if they campaigned for the Union.

⁹Plant Manager Gonzales and Personnel Manager Ostrowski also attended the performance review meetings.

4. Double check set-up pans to determine if all gages [sic] and tools are correctly in the pan.
- 4a. Secure stock as required.
- 4b. Secure tools as required.
- 4c. Secure gages [sic] as required.
5. Important to make sure the operators are at their work stations and performing their work duties.
6. Train assigned trainees in the use of equipment, piece part inspection procedures and set-ups.
7. See that jobs are run as scheduled.
8. With Production Control, schedule jobs.
9. Keep track of production so that orders are filled.
10. Make records and tapes of jobs.
11. Keep list of spent tooling.
12. See that scheduled maintenance on equipment is performed.
13. Work with serviceman as needed and perform requested troubleshooting.
14. Responsibility for immediate work area appearance.
15. Will not be a production employee or physically account for his time.
16. Write and improve on programs. When possible, try to make jobs run faster and improve set-up times.
17. Assist Department Head in evaluating employees prior to their Performance Review.
18. Any other responsibilities as assigned by the supervisor.

At the time of the hearing in this case Respondent had not hired or assigned anyone to replace Freid as leadperson in the CNC department. Instead, Respondent used an employee from the engineering department to perform some of the technical work that Freid had performed. The person from the engineering department was not moved to the CNC department; instead he was used in a "dual role" in both departments.

D. Production

As described above, by virtue of his duties as leadperson Freid played a role in maintaining the productivity of the CNC department, and Respondent took that departmental productivity into account in assessing Freid's performance. However, prior to November 1995, Freid was never shown the production records that Respondent kept for that department. These records show that productivity in that department began to decline. For example, productivity as measured by hours per machine per week produced declined from 65.5 for August 1995, to 46.2 for September 1995.¹⁰ This was the steepest decline in productivity among the four primary production departments. For October 1995, the records show that the productivity level in the CNC department rose to 52.3. Productivity for November 1995, declined to 38.1 and the backlog for the CNC department was the largest among all four primary production departments. In December

1995, the productivity in that department declined to 32.2 and in January it rose to 37.7.¹¹

At the hearing Freid agreed that production had dropped in the CNC department. He attributed the decline in productivity to various factors. When production was high they were running the same job on each of the machines, but when there was a decline in productivity the department had been running shorter jobs that required more time for set up. In support of this assertion the General Counsel introduced documentary evidence comparing productivity figures for the month of January 1995, with those of December 1995. Those records showed that in January the machines in the CNC department were producing 1920.11 hours; for December that number was 1263.15. For January 120.36 hours were spent on machine set up; for December that number rose to 220.50. In January the machinery was unusable 28.30 hours; for December that number was 107.00. Finally, in January the machinery was unusable for nonjob-related reasons 5.20 hours; in December that number was 23.10. Freid also explained that there was less productive time when training was involved since the operator being trained was not already familiar with the machine.

The new machinery, additional set up time and downtime, and training accounted for some decline in the productivity of the CNC department, but it did not fully explain the extent of the decline in production experienced in that department.¹²

E. Attendance¹³

As indicated above, during Freid's oral evaluation in December 1995, Obert and Gonzales asked Freid to attempt to improve his punctuality; that this was setting a bad example for other employees. Respondent's attendance policy in effect in 1995 provided that an employee would receive a point if the employee did not work at least 4 hours on a scheduled workday. An employee would receive two points if the employee did not call and failed to report to work on a scheduled workday. When the employee accumulated 10 points during the period from January 1 through December 31, the employee would receive a verbal warning; at 12 points the employee would receive a 3-day suspension and at 13 points the employee would be terminated. No points were assessed against employees for arriving tardy or leaving early so long as the employee worked 4 hours.

Attendance records show that during 1995 Freid arrived late or left early approximately 88 times and these occasions were spread fairly evenly throughout the entire year. Freid was usually tardy no more than 5 minutes. No points were assessed against Freid on these instances under Respondent's attendance policy. For that year Freid had accumulated six points due to other instances of absence; thus he was in no danger of being disciplined. In January 1996, Freid was late

¹⁰ The numbers for the other months of that year are as follows: January—78.1, February—77.2, March—73.3, April—86.5, May—86.8, June—69.9, and July—64.0.

¹¹ Freid testified that at a meeting he challenged how Respondent calculated the productivity in the CNC department. However, there is no evidence that Respondent changed the manner in which it measured productivity at any point relevant to these proceedings. Thus, whether Respondent's measure of productivity was the most accurate way to do so is irrelevant.

¹² This is based on the credible testimony of Obert and Meaden.

¹³ The findings in this section are based on the largely uncontested testimony of Freid and Obert as well as relevant documentary evidence.

or left early only three times; he had accumulated only one point. The General Counsel and Respondent stipulated that other leadpersons did not have the attendance problems that Freid had. Also, as more fully described above, Freid received a written evaluation in June. In that evaluation he received the highest rating in dependability, the category meant to cover attendance.

F. Communication Problems¹⁴

Prior to the Union's organizing campaign Freid had co-operated well with Obert in terms of communicating to Obert what was happening in the CNC department. Thereafter, Freid became less communicative. When Obert asked a question, he would get a short, abrupt answer. Obert felt that he had to pry information out of Freid. Obert raised the problem with Freid, asking him what had changed. Freid responded that he did not feel there had been any change. Obert testified "But there was no more made of it than that." Obert communicated this matter to Meaden and Gonzales.

G. The Termination

On February 2, at approximately 30 minutes before his shift was scheduled to end, Freid was summoned to Meaden's office. Freid had been working on the C7 machine and he was unable to complete the set up of that machine due to the meeting that ensued. Present in Meaden's office with Freid were Meaden, Obert, and Schreiner. Meaden said that he felt that Freid's work performance was not good and that production in the CNC department was declining. Meaden said that Freid's attendance was very poor and that Freid "showed no emotion when another employee walked off the job."¹⁵ Meaden also said that Freid did not completely communicate with his supervisor, Obert, explaining that Freid did not relate the details of what was going on in the CNC department to Obert.¹⁶ Meaden concluded by saying that Freid's services were no longer needed. Obert escorted Freid to his locker, and as they were leaving the building Freid asked if he could go back to Meaden's office, and Obert and Freid returned to Meaden's office. Schreiner was still there. Freid told Meaden that he strongly disagreed with the reason given for his discharge and that he would examine different avenues to pursue the matter. Meaden said that he understood and that Freid had to do what he had to do.

Prior to his termination Freid had never been issued any written discipline. On one occasion in 1993 Freid was given a verbal warning to improve his setup times. At the hearing Obert testified that he thought that overall Freid had been a good leadperson. Obert, Freid's direct supervisor, was not consulted concerning the decision to discharge Freid; instead,

he was simply advised of the decision on the day of Freid's termination.

Meaden, Respondent's president and chief operating officer, made the decision to discharge Freid. Meaden, who had been employed by Respondent for 25 years and has occupied his current position for 15 years, has a degree in mechanical engineering, and has the ability to run some of the machines in the CNC department. He testified that he discharged Freid for three primary reasons: lack of communication, poor productivity, and absenteeism. He made this decision a day or two before Freid was fired.

Before Freid was fired Meaden conferred with Respondent's attorney, Schreiner, on approximately three occasions. During those discussions Meaden stated that production in the CNC department had been terrible and Freid was responsible for that. Meaden said that he suspected that this was deliberate on the part of Freid, although he had no "hard evidence" to prove this. Meaden said that there was no other reasonable explanation. Meaden said that combined with the complaints regarding Freid's lack of communication, he felt that Freid may have been intentionally causing the problems. Schreiner counseled Meaden that while he understood that Meaden's perception of deliberate misconduct by Freid would play a role in determining whether discipline short of discharge would be appropriate, "I don't think we should go in and do a lot of needless finger pointing over issues that you suspect but you don't have hard evidence of."¹⁷

H. Sabotage

On the day of his discharge Freid was working on the T-7 machine in the CNC department. This machine had been added to the department in September 1995. Sometime after Freid was fired the T-7 machine "crashed" when an employee attempted to operate it. The crash was apparently the result of incorrect programming. It caused damage and the machine was unusable for at least a day.

Wayne Weichinger worked as an operator in the CNC department with Freid. On February 2, the day Freid was fired, Weichinger started work at 4 p.m. Weichinger learned from another employee that Freid had already been fired. Weichinger called Freid from work and asked him why he had been fired; they talked for about 5 minutes. The record does not otherwise directly reveal what Freid and Weichinger discussed during this 5-minute period. Although records show that Weichinger was not assigned to work on the T-7 machine, when Weichinger returned to work after the telephone call to Freid, he worked on the T-7 machine. In the affidavit that Weichinger provided to the Board during the investigation in this case Weichinger stated that he had not been scheduled to work on the T-7 machine on the day Freid was fired, and later in his examination Weichinger finally admitted that no one assigned him to work on the T-7 machine that day; he asserted at that point that it would have been a normal part of his routine to work on the T-7.

Weichinger testified that he downloaded the programs from the computer onto the T-7 machine, that he did not perform any production on the T-7 nor did he notice any problems with that machine. Previously, he had received some training from Freid on how to operate that machine. When

¹⁴ The findings in this section are based on the credible and largely uncontested testimony of Obert.

¹⁵ This refers to an incident when an employee left the worksite after he was upset with a performance review that he had received.

¹⁶ At the hearing Freid initially testified that he responded to this comment from Meaden by saying that he felt that he had been communicating with Obert but that Obert did not have the technical knowledge necessary to understand the operation of the department. However, when Freid was presented with the affidavit that he had supplied to the Board during the investigation of the charge in this case, and the affidavit did not contain any reply to Meaden's comment, Freid recanted this testimony.

¹⁷ This is based on the testimony of Schreiner which I conclude is fully credible in this regard.

Weichinger appeared for work the following Monday he was told that there had been a problem with the program on the T-7. Weichinger testified that when he examined the machine he discovered that on the previous Friday when he was downloading the program he accidentally erased it and that in the process of correcting the problem he accidentally loaded the wrong program.

Weichinger was a supporter of the Union and had "Union yes" sticker on his car. He admitted that he never told any supervisor that he was responsible for the error on the T-7. This was despite the fact that about month later he had heard that there was an allegation that Freid had sabotaged the T-7 machine and he heard from a union representative that Freid had admitted to sabotaging machines. Weichinger denied that Freid ever asked him to sabotage equipment or ever counseled him on how to do so.

On February 28, the Union filed an unfair labor practice charge alleging, inter alia, that Freid's discharge violated Section 8(a)(3) and (1) of the Act. In an effort to settle that case and to prepare for the impending hearing on Respondent's objections, Cooper, grand lodge representative for the Union, met with Freid. Prior to meeting with Freid, Cooper has discussed the case with Schreiner, who had voiced Respondent's position that Freid had engaged in sabotage. During the discussion with Freid, Cooper conveyed to him Respondent's contention and asked about that. Freid responded with a pause. Cooper said that if he was going to be able to help Freid, he needed to know the truth, and he asked Freid if Freid did do the sabotage. Freid said no, he did not do it. The conversation then turned to other matters. A few minutes later Freid said, "I did not sabotage the machine. I had someone else do it."

At the hearing Freid denied that he ever sabotaged any of Respondent's equipment. He also denied that he ever counseled employees to sabotage Respondent's equipment; he likewise denied that he ever told anyone that he had done so. Freid admitted that he had met with Cooper to explore the evidence concerning Freid's supervisory status. Freid also conceded that during the course of the meeting he was asked whether he had engaged in sabotage while employed by Respondent. Freid testified that he responded by denying that he had sabotaged equipment or that he ever said that he "had someone else do it."

III. ANALYSIS

A. The Supervisory Issue

Respondent contends that Freid is a supervisor as defined in Section 2(11) of the Act and thus is not entitled to the protection that the Act accords to employees. The Board has long held that the criteria enumerated in Section 2(11) are to be read in the disjunctive; if an individual possesses a single attribute listed in that section, that individual is a supervisor. *Florence Printing Co.*, 145 NLRB 141, 144 (1963). However, the exercise of otherwise supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status on an employee. *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994). The Board has recently restated that in enacting Section 2(11) Congress stressed that only persons with genuine management prerogatives, as opposed to "straw bosses" and other minor supervisors, should be considered supervisors and that the Board has a duty not

to construe supervisory status too broadly because that would deprive individuals of the protection of the Act. *Cassidy Management Corp.*, 323 NLRB No. 68 (Apr. 14, 1997). The burden of proving supervisory status is placed on the party making that assertion. *Bowne of Houston*, 280 NLRB 1222 (1986). Particularly important in this case is the Board's holding that exercise of authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated by Section 2(11). *Adco Electric*, 307 NLRB 1113, 1120 (1992). Finally, the secondary indicia of supervisory status are in themselves not controlling. *Consolidated Services*, 321 NLRB 845, 846 fn. 7 (1996).

Respondent argues that Freid assigns work and thus is a supervisor. I conclude, however, that the assignment of work was not done with sufficient independent judgment to establish supervisory status. As described above in more detail, Freid oversaw 6 employees and 11 machines. The production schedule was established by someone other than Freid and he sought permission before he deviated from that schedule. As operators become available, Freid did assign them to work, using his knowledge of their skills in making the assignment. However, the skill levels of the employees were, for the most part common knowledge and easily discernible. That is, they were either able to operate a particular machine or they are not. Although some judgment was clearly used by Freid in assigning work, it does not rise to the level of the exercise of independent judgment required to constitute supervisory status. The day-to-day guidance and training that Freid provided to the other operators is likewise not indicative of true supervisory status; instead, it appears to flow from his superior knowledge as a modern day skilled craftsman. The same can be said for part Freid played in quality control checks that he performed.

In this regard Respondent relies on *Rose Metal Products*, 289 NLRB 1153 (1988). In that case the Board noted that the person at issue assigned tasks to six to eight employees based on his assessment of the skill level required by the work order, his knowledge of the skill level possessed by the individual employees, and the availability of the employee to work on the task. However, in that case the Board, on the record before it, concluded that the individual "utilizes independent judgment" in assigning work. That is different from this case, where I have concluded, based on this record, that there is insufficient use of independent judgment to establish supervisory status. Thus, *Rose Metal* is inapposite. *NLRB v. Ajax Tool Works*, 713 F.2d 1307 (7th Cir. 1983), cited by Respondent is also distinguishable because there the court concluded that the assignments made the supervisor showed the exercise of some independent judgment, unlike this case. These cases, like so many in this area of law, are fact specific and turn on the nuances and inferences from their own individual records.

Respondent also relies on the role Freid played in performance appraisals as proof that he is a supervisor. As I have found above, prior to the union campaign Obert would ask Freid about an operator's work performance and that information would be used by Obert in giving the operator a performance review. It will be recalled that Obert also relied on other information from records in reaching his conclusions. There is no evidence that Freid ever made specific recommendations much less that any recommendations were ef-

fectively relied on by Respondent. Instead, Freid's role in this regard was purely reportorial in nature and thus insufficient to constitute genuine supervisory authority. When Respondent made an effort to engage Freid in a more formal way in the performance review process after the union campaign was underway, Freid continued to resist providing any specific recommendations. In any event, Respondent's conduct in this regard were clearly an effort to clothe the leadpersons, including Freid, with indicia of supervisory status to strengthen their position in the representation. Because it was not clear at the time of Freid's discharge that the newly assigned duties were to truly become permanent responsibilities or whether they were temporary measures designed to last no longer than the conclusion of the representation case, they are hardly of a determinative nature.

Respondent next argues that Freid's role in approving maintenance requests and production reports is indicative of his supervisory status. To the contrary, the record is clear that Freid's approval of those reports was merely routine and clerical in nature and does not demonstrate supervisory authority. Respondent points out that Weichinger, in his testimony at one point described Freid as his "supervisor." However, it is axiomatic that mere title does not resolve the issue of supervisory authority, and there is otherwise insufficient evidence to show either that Respondent held Freid out to be a supervisor or that employees regarded him as such.

Respondent's points to parts of Freid's job description which it feels establish supervisory authority. In particular, it notes that job description indicates that the CNC leadperson was to make sure that operators were at their work stations working. While the genuine possession of supervisory authority is sufficient to establish that a person is a supervisor, even if the authority has never been exercised, the authority must be real. I conclude that in this instance the purported authority in the job description was not a genuine devolution of supervisory authority to Freid. Not only is there no evidence that Freid ever exercised that authority, but the credible evidence in the record as a whole shows that he never actually possessed that authority.

Respondent points to the instance when Freid reported to Obert that an operator was damaging tooling as evidence that Freid disciplined employees. Sporadic and occasional instances of this type, however, are insufficient to show supervisory status. In any event, the incident hardly showed Freid as possessing such authority. The evidence shows that Freid reported property damage, something that employees might report to management regardless of status, and that even after Obert spoke to the operator about the matter, the operator continued to insist that he was right, but promised that he would try and "work things out" with Freid. Obert did nothing further. This incident shows that the operator regarded Freid more as an equal than a superior. Respondent also points to the Deron Boswell incident that has been fully described above. However, that incident also shows that Boswell was defiant of Freid's directions and that Obert actually upbraided both the Boswell and Freid. These incidents are not sufficient to meet Respondent's burden.

Finally, Respondent cites a number of factors pertaining to Freid that were different from the operators in the CNC department. It points out, for example, that Freid was the highest paid person in his department, that he was evaluated differently from other operators and that he began to attend su-

pervisory and management meetings.¹⁸ However, these secondary indicia are not determinative of supervisory status.

I therefore conclude that Respondent has not produced sufficient evidence to meet its burden of establishing that Freid was a supervisor.

B. The Termination

The analysis set forth in *Wright Line*¹⁹ governs the determination of whether Respondent violated Section 8(a)(3) and (1) as alleged. The Board has restated that analysis as follows:

Under *Wright Line*, General Counsel must make a *prima facie* showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.⁷ An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.⁸ Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.⁹

⁷ *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

⁸ See *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) ("By assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

⁹ See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

I now examine the credible evidence in the record to determine whether the General Counsel has met his initial burden. The evidence shows that Freid engaged in union activity and Respondent knew this. As more fully described above, Freid contacted the Union and assisted in the organizational effort. Respondent knew of Freid's union support by at least December 1995, when Obert expressed surprise on learning that Freid had been the person to initially contact the Union. Indeed, Respondent admitted knowledge of Freid's union activity when, on January 24, it filed objections to the election wherein it alleged that certain leadpersons, including Freid, had engaged in active campaigning for the Union. I conclude that the General Counsel has established the elements of protected union activity and Respondent's knowledge of that activity. However, these elements alone are insufficient to establish a *prima facie* case.

¹⁸ The General Counsel, of course, points to other secondary indicia, such as the fact that Freid punched a timeclock and ate lunch with the operators, and that no "supervisor" has been hired to replace Freid, to argue that Freid is not a supervisor.

¹⁹ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

Regarding the element of antiunion animus, I note that it is significant that the complaint does not allege, nor does the evidence show, that Respondent has engaged in conduct independently violative of Section 8(a)(1). Despite the absence of this normally persuasive evidence of animus, I examine the record as a whole to determine whether it establishes Respondent's animus. There is no doubt that Respondent opposed the unionization of its employees. This is shown by the fact that it conducted an antiunion campaign. However, so far as this record shows, the campaign was conducted within the confines of the Act. Respondent voluntarily agreed to have the Board conduct an election among its employees. Moreover, after contesting the election results for a period of time, Respondent withdrew its objections, recognized the Union, and successfully bargained with the Union to agreement on a new contract. This indicates that Respondent accepted the wishes of the majority of its employees concerning union representation. Respondent also took the position that leadpersons, including Freid, were supervisors who were not protected by the Act or entitled to union representation. Although I have concluded that Freid was not a supervisor, Respondent's position on this issue was reasonably litigable, especially the issue of whether Freid assigned work using independent judgment. Also, based on my credibility resolution, I have concluded that Respondent was careful not to threaten the leadpersons with discharge if they continued to engage in union activity. I note that Respondent did not use this issue to delay the representation proceeding, since it agreed that leadpersons could vote subject to challenge. Finally, the evidence shows that Respondent and the Union were able to resolve this issue in a mutually satisfactory manner. Concerning Respondent's reaction to Freid's union activity, the evidence shows that Respondent displayed a total absence of hostility or anger. Even after Respondent learned of Freid's union activity, he received a favorable performance evaluation in late December 1995. I conclude, based on the record as a whole, that the General Counsel has not established that Respondent was so hostile to the unionization of its employees and leadpersons that this hostility would have been a motive for Respondent to unlawfully discharge Freid. Thus, the General Counsel has not yet established a prima facie case.

Concerning the timing of Freid's discharge, although he was not fired during the critical preelection period or during the time period immediately after Respondent discovered his union activity, I note that Freid was discharged approximately 2 weeks after the election. This timing could show that Respondent had decided to heighten its antiunion efforts as part of an effort to resist the unionization of its employees. However, such an inference is not warranted based on the record as a whole in this case. Rather than resist the union efforts of its employees, Respondent withdrew its objections to the election, recognized the Union, and negotiated a contract. In the process Respondent resolved the issue of the status of the leadpersons with the Union. The General Counsel cites *Douglas Aircraft Co.*, 308 NLRB 1217 (1992), in support of his argument that unlawful motive can be inferred from the timing of a discharge. Although there is no question that that can be the case, the facts in *Douglas Aircraft* only serve to show why that inference is not warranted in this case. In *Douglas Aircraft* the administrative law judge found that a series of discipline coincided with a continuing

pattern of protected activity. That is unlike the timing of Freid's discharge, which seems to coincide with little of consequence when the facts are viewed in their entirety. Thus, while the timing of Freid's discharge does add somewhat to the General Counsel's case, I conclude that it is insufficiently persuasive, when considered with the other evidence described above, to meet the initial burden that the General Counsel is required to carry.

Although the General Counsel does not explicitly argue in his brief that Respondent's unlawful motive can be inferred from the allegedly pretextual nature of the reason given to justify its discharge of Freid, at the hearing such an argument was made. I shall, therefore, deal with that issue. The Board has held that when a respondent's stated motives for a discharge are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Respondent has asserted three reasons for discharging Freid: declining production in the CNC department, poor attendance, and deteriorating communication. Although the evidence seems clear that Respondent was at least exaggerating Freid's problems in these areas, I find it unnecessary to resolve whether these reasons were totally pretextual. Assuming that were, I still do not draw the inference that the reason for discharge would therefore be an unlawful reason. This is so because I have credited Schreiner's testimony that Meaden had another reason for discharging Freid that was not communicated to Freid: that Meaden suspected Freid of deliberately impairing production in the CNC department. I conclude that was the reason for Freid's discharge. I note that Meaden had a certain amount of knowledge of the workings of the highly technical CNC department, unlike Obert. Thus it is not surprising that Obert played only a small role in Freid's discharge. I have concluded above that Freid's explanation of the sharp decline in production in the CNC department did not fully explain that drop. I have further concluded above that Freid's attitude, as shown by an unwillingness to communicate freely with Obert, declined during the election campaign and at a time when production was generally declining. These matters lead Meaden to conclude, rightly or wrongly, that Freid was deliberately impairing production; this caused Freid's discharge. It does not matter in this case whether Meaden's decision was fair or reasonable; it matters only that the reason was not related to Freid's union activity. I recognize that Respondent has not asserted this as the reason for Freid's discharge. Normally, I would be reluctant to find as the reason for discharge a reason not advocated by the employer itself. However, here Schreiner's credited testimony provides an explanation. When Meaden expressed his concern that Freid was deliberately impairing production, Meaden admitted that he had no "hard evidence" to prove that assertion. Schreiner then counseled Meaden not to "do a lot of needless finger pointing over issues that you suspect but you don't have hard evidence of." Meaden and Schreiner thereafter followed this advice. Under these circumstances, I decline to infer an unlawful motive in Respondent's discharge of Freid.

I, therefore, conclude that the General Counsel has failed to establish a prima facie case, and I shall recommend that the complaint be dismissed.

C. Posttermination Events

As indicated above, Respondent argues that even if Freid was unlawfully discharged he is not entitled to reinstatement and full backpay due to events that occurred subsequent to his discharge. Respondent relies on *Opryland Hotel*, 323 NLRB No. 127 (May 15, 1997), wherein the Board stated, “[W]here . . . an employee is unlawfully discharged, reinstatement and backpay are appropriate remedies unless the employer can show subsequent acts (or discovery of same) which would have resulted in a lawful discharge.” I have thus far found it unnecessary to resolve that issue because I have determined that Respondent did not unlawfully discharge Freid. However, in the event that I am reversed on that finding, I have decided to resolve Respondent’s alternate argument while the facts of the case and the demeanor of the witnesses are still fresh. If my finding that Freid was not unlawfully discharged is not reversed, then the subsequent findings are unnecessary and should be regarded as such.

I do not credit Freid’s testimony that he did not counsel other employees to perform sabotage of Respondent’s equipment or that he ever told anyone that he had done so. Instead, I credit Cooper’s testimony that Freid admitted that he “had someone else do it.” I find no reason to disbelieve Cooper’s testimony.²⁰ In addition to Cooper’s convincing demeanor, I find it highly unlikely that Cooper, a union agent, would simply fabricate testimony of this nature.

I also do not credit the testimony of Weichinger that the “crash” of the T-7 machine after Freid’s discharge was due to Weichinger’s inadvertent error. In addition to my assessment of Weichinger’s demeanor, I rely on the fact that his testimony was obviously evasive in critical matters such as whether he was assigned to work on the T-7 on the day in question. I also consider the inherent probabilities based on the record as whole. Thus, the evidence shows that shortly after Freid was fired Weichinger called him from work and

had a 5-minute conversation with him. Thereafter, without being assigned to so, Weichinger worked on the T-7 machine, the very machine that Freid had started to work on before he was fired.²¹ Subsequently, the T-7 crashed, yet even after Weichinger discovered that Respondent was suspecting that fellow employee Freid had sabotaged the T-7, Weichinger did not tell Respondent that he had innocently caused the error; instead, he waited until the hearing in this case to do so.

Based on this testimony I conclude that Respondent has established that it would have discharged Freid in any event when it discovered that Freid had counseled other employees to deliberately damage Respondent’s property. In the event that Freid was unlawfully discharged on February 2, he would not be entitled to reinstatement. The amount of backpay, if any, to which Freid would be entitled would be determined in the compliance stage of these proceedings.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not engage in the unfair labor alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

ORDER

The complaint is dismissed.

²¹ I do not credit Weichinger’s conclusory testimony, coming after a series of evasive answers, that he decided to work on the T-7 because it was part of his normal routine.

²² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁰ The General Counsel’s brief does not mention this testimony or address this issue.